Privy Council Appeal No. 23 of 1976

B.P. Refinery (Westernport) Proprietary Limited - - *Appellant*

v.

The President Councillors and Ratepayers of the Shire of Hastings - - *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF VICTORIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1977

Present at the Hearing:

LORD WILBERFORCE
LORD MORRIS OF BORTH-Y-GEST
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE
LORD KEITH OF KINKEL

[*Majority Judgment delivered by* LORD SIMON OF GLAISDALE]

This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria upon a Case Stated by the County Court at Melbourne under section 304 of the Local Government Act 1958 (as amended) of Victoria. It involves the interpretation of an agreement ("the rating agreement") made between the appellant company and the respondents on the 7th May 1964 pursuant to the provisions of section 390A of the Local Government Act. It will be necessary to set out later more fully the relevant provisions of that agreement and of section 390A. At this stage it is sufficient to say that the agreement was concerned with the preferential rating of an oil refinery of which the appellant company was in occupation at the time both of the rating agreement and also of the application to the Court but of which it had been intermediately out of occupation. On any showing the agreement presents difficulties of construction. The Full Court construed it by holding that there was an implied term in the agreement that it should come to an end on the appellant company ceasing to be in occupation, notwithstanding subsequent re-occupation.

As Lord Wilberforce said in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1383H; 3 All E.R. 237, 239J:

> "In order for the agreement . . . to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."

Such a consideration of the matrix of an agreement is particularly called for when it is sought to imply in it a crucial term which the parties have not expressed. In the instant case consideration of the context of the agreement is, in their Lordships' opinion, essential.

The immediate matrix of the rating agreement was two-fold: first, the statutory provision, section 390A, inserted in the Local Government Act by the Local Government (Decentralized Industries) Act 1963, which came into force on the 28th May 1963, empowering a local authority to enter into an agreement with an industrial occupier for preferential rating in such terms as are contained in the rating agreement; secondly, an agreement ("the refinery agreement"), which was given statutory force on the same day, between the State of Victoria and the appellant company, providing for the construction by the appellant company of an oil refinery and appurtenant facilities within the district of the respondent local authority. The two statutory provisions—one providing for the construction of the refinery, the other permitting its preferential rating—are obviously twin implementations of a policy of securing decentralization of industry by offering preferential rating. They must have been preceded by tripartite negotiations between the State of Victoria on the one part, the general worldwide BP industrial complex on the second part, and the respondents on the third part. The appellant company was specifically incorporated in 1963 within the BP group as a wholly owned subsidiary of the BP Company of Australia (a holding company referred to in the refinery agreement), to establish and operate the refinery which was to be sited within the respondents' district. (It appears from later correspondence that there was in Australia within the BP group by 1969 another company operating a refinery at Kwinwana (W. Australia) and also a company called BP Australia Limited.) The first evidence of the success of such negotiations was the refinery agreement dated the 15th May 1963. It appears as the schedule to the Westernport (Oil Refinery) Act 1963 (No. 7018), which was required to give effect to the refinery agreement and which passed into law on the 28th May 1963.

The parties to the refinery agreement were the Premier of Victoria for and on behalf of the State and the appellant company. There were four recitals, of which the first two only need be quoted:

> "I. The Company is desirous of establishing an Oil Refinery at Crib Point in the said State.
>
> II. The State for the purpose of encouraging the decentralization of industry desires to assist the Company in establishing the said refinery."

Clause 1 defined certain terms in the agreement. They included the following:

> "'Commencing date' means the date of execution of this Agreement.
>
> 'Commissioning date' is the date on which the Company first receives petroleum for processing into the refinery from a tanker. [The actual commissioning date does not appear from the evidence.]
>
> 'Company' means BP Refinery (Westernport) Pty. Limited and if the rights of the Company are assigned pursuant to this Agreement to any company means that assignee company."

Clause 3 of the refinery agreement laid down the obligations of the Company. The principal one was:

> "After the commencing date and without undue delay [to] commence and complete the construction of the refinery and thereafter maintain operate and use the refinery and all additions and alterations thereto; ".

At the cost of the State (not exceeding £3·5m.) the Company undertook to construct jetties at the refinery site and sea-going tugs and small craft; also to dredge and keep dredged substantial navigable channels and shore-side areas of water. The Company itself was at its own cost responsible for the maintenance of the jetties " until twenty years after the commissioning date and for such further periods as are from time to time agreed between the Company and the Premier "; and the Company was also responsible for the construction of various jetty facilities. In the erection, equipment and operation of the refinery, the Company undertook to

> " comply with accepted modern refinery practice and the standards and specifications required for the time being in the construction and operation of refineries in Great Britain and the United States of America; ".

By clause 4 of the refinery agreement the State undertook a number of obligations designed to facilitate the construction and subsequent operation of the refinery. One of these—the construction and maintenance of internal roads on the refinery site—was to be at the cost of the Company.

Clause 6 (*b*) and (*c*) of the refinery agreement are of crucial significance in this appeal. They read:

> " (*b*) Without affecting the liability of the parties to each other under this Agreement either party shall have the right from time to time to entrust to other persons the performance of such portion or portions of its obligations and operations authorized under this Agreement as it may consider expedient.
>
> (*c*) The Company shall have the right to assign or otherwise dispose of this Agreement or any interest therein to a company in which The British Petroleum Company of Australia Ltd. a company incorporated in the Australian Capital Territory . . . holds thirty per centum or more of the issued share capital."

Clause 6 (*g*) provided:

> " If the Company—
>
> (1) enters into liquidation (other than a voluntary liquidation for the purpose of reconstruction); or
>
> . . . . .
>
> (3) abandons or repudiates this Agreement—
>
> the State may by notice in writing determine this Agreement . . ."

Their Lordships would draw attention to certain features of the refinery agreement. First, the enormous scale of the investment to be made, principally by the Company but also by the State. Secondly, the length of time envisaged by the agreement—for example, the Company's obligation to maintain the jetties was at least twenty years. Thirdly, nevertheless, except as provided by clause 6 (*g*) the refinery agreement had no provision at all for its termination. Fourthly, the provision for performance by third parties. Fifthly, the provision for assignment to any company in which the BP Company of Australia had a 30% or more interest. Sixthly, the contemplation of a voluntary liquidation for the purpose of reconstruction. (The last three features indicate that the personality of the appellant company as a party to the refinery agreement was not of primary importance.)

On the same day, the 28th May 1963, as the refinery agreement received statutory sanction, the Victoria Parliament passed the Local Government (Decentralized Industries) Act 1963. This inserted a new section in the Local Government Act 1958. Under the 1958 Act general rates are made and levied at least annually by the council of every municipality. They are payable by the occupier of rateable property within a municipal district, the normal basis of assessment being an amount per dollar of either the unimproved capital value or the net annual value of the property. The Act also makes provision for special rates and extra rates. The Local Government (Decentralized Industries) Act 1963 inserted a new section, 390A:

> "(1) The council of any municipality may enter into an agreement with any person liable to be rated in respect of any land within the municipality which is not within a radius of twenty-five miles of the General Post Office at Melbourne and which is used or to be used for industrial purposes as to the amount of rates that will be payable by him under this Act and the amount of rates so agreed to be paid shall notwithstanding anything in this Act be for all purposes the rates that may be made and levied under this Act in respect of that land.
>
> (2) No such agreement shall be made unless the council is of the opinion that the establishment or maintenance of that industry within the municipality makes a substantial contribution towards the industrial development of the municipality and encourages the decentralization of industry in Victoria.
>
> . . . . .
>
> (4) The amount of rates to be paid under an agreement may be an amount specified in the agreement or may be an amount calculated in accordance with a method specified in the agreement".

On the 7th May 1964 the appellant company, being then the occupier of the refinery site at Crib Point within the respondents' municipal district, entered into an agreement with the respondents pursuant to section 390A—namely, the rating agreement which falls for construction in the instant appeal. The respondent was called the "Shire" in the agreement, the appellant company "the Company". It is desirable to quote from the recitals:

> "(i) The Company is desirous of establishing an oil refinery on certain lands situated at Crib Point . . . (Hereinafter called "the refinery site").
>
> (ii) The Company has entered into an Agreement with the State of Victoria relating to the establishment of the said refinery and the construction of port facilities at Crib Point which Agreement as ratified by the Westernport (Oil Refinery) Act 1963 is hereinafter called "the Refinery Agreement".
>
> (iii) The Company occupies and intends to become the registered proprietor of the refinery site and is liable to be rated in respect thereof.
>
> (iv) The Shire is of the opinion that the establishment and maintenance of the said refinery within the municipal boundaries of the Shire makes a substantial contribution towards the industrial development of the municipality and encourages the decentralisation of industry in Victoria.
>
> . . . . .
>
> (vii) The Shire and the Company have agreed upon the amount of the rates payable by the Company on the refinery site."

Clause 2 of the rating agreement regulated the rates which would be payable by "the Company" in respect of the refinery site for a period of upwards of forty years. It may be summarised as follows:

(1) For the year ending 30th September 1964, £1,000.

(2) For the year ending 30th September 1965, £2,000.

(3) For the year ending 30th September 1966, until the commissioning date as defined in the refinery agreement, £3,000.

(4) There were complicated provisions for the sum payable by way of rates in the year of commissioning.

(5) The provision for rates for the ten years after the commissioning year was for an annual amount of not less than £25,000 and variable upwards by reference to the total amount of the capital expenditure of "the Company" upon the refinery site from time to time, the variation depending on an equation of capital expenditure of £20,000,000 with rates of £33,000 per annum.

(6) For the next thirty years the formula governing the ten year period referred to in (5) above was to continue with a variation in a contingency which need not be rehearsed here.

Clause 4 provided that the rating agreement would cease to have effect at the end of the thirty year period referred to in (6) above.

Clause 5 must be cited in full:

> "From and after the said commissioning date the Company shall after the preparation of each annual Balance Sheet and Statement of Accounts and on or before the first Tuesday in December in each year give to the Shire a statement certified by the Company's auditors of the amount of the Company's capital expenditure upon the refinery site and such details thereof as the Shire may reasonably require the first of such statements to include the amount of such capital expenditure to that date and to specify the amount of such capital expenditure as at the commissioning date and subsequent statements to include the amount of such capital expenditure during the twelve (12) months preceding the date to which the accounts of the Company are made up."

By clause 9 the rating agreement was subject to the approval of the Governor-in-Council (in accordance with section 390A), which was given in due course.

There are several matters of importance which should be noticed right away. First, and most important, the rating agreement had express provision for its termination at the end of the forty year period (10 plus 30): it contained no express provision for its termination on the appellant going out of occupation; any such term in the agreement would therefore be a matter of implication. Secondly, the rating agreement being expressly framed to cover a period of forty years or more, it is to be assumed that it was the preferential rating over this long period which was held out to the appellant company as the incentive to the establishment of a large refinery within the respondents' district. Thirdly, like the refinery agreement, the rating agreement bore testimony to the great sums which were envisaged as to be invested in the refinery. Fourthly, the rating agreement was set within the framework of the refinery agreement, not only by implication but also by express reference. Not only is the rating agreement referred to in the recitals, but the operation of the agreement—the determination of the rates payable in any year—is to depend not only on the amount of capital expenditure but also on the commissioning date defined in the

refinery agreement. The main significance of this is that the refinery agreement contained provision for assignment within the BP group in Australia and also for performance by third parties. Fifthly—and again critically—if the rating agreement were to be interpreted purely on internal linguistic considerations, with the result that "Company" was to be read as referring only to the appellant, it would be possible for the BP group to arrange that the capital expenditure on the refinery site should be made by some company in the group other than the appellant. This would be no breach of either the refinery or the rating agreement. But, since the rateability of "the Company" under the rating agreement is geared to capital expenditure by "the Company", the rates payable by "the Company" during the last forty years of the agreement could then be considerably less than the parties obviously contemplated. For example, to take the figures of the pivotal equation, if the capital expenditure on the site by some other company in the BP group were £20m, the annual rates payable by "the Company" would be, not £33,000, but £25,000. And however much the capital expenditure were further increased in this way, the annual rates would still remain at £25,000.

Their Lordships would draw attention to two other matters which must be borne in mind when it comes to the implication of any term in the rating agreement. First, both parties secured substantial benefits over a long period. For the appellant company it was the preferential rating. For the respondents there were the recited advantages of industrial development within their area; there were the large rates (albeit preferential) on the refinery; and there would be full rates on hereditaments ancillary to the refinery (*e.g.*, housing for the workers, and shops to serve them). Secondly, the expenditure of a very large sum of money on an important industrial installation in a particular place may well be irrevocable. If the incentive to the siting within the respondents' district should be withdrawn, the installation could not by the mere passing of a corporate resolution be removed elsewhere, as if it were a unit in a cottage industry. Once tempted to a particular site it is there for good—or ill.

The rating agreement was approved by the Governor-in-Council on the 26th May 1964. Thereafter, until the 31st December 1969 the appellant company remained in occupation of the refinery site, and its liability to pay rates was calculated in accordance with clause 2 of the rating agreement.

On the 15th December 1969 the appellant company wrote to the Secretary of the Shire of Hastings, the letter being signed by L. F. Ogden, General Manager:

> "For several months now, BP in Australia has been considering its corporate structure with a view to seeing how it could be streamlined and improved. The conclusion which has yet to be approved by our Head Office in London amounts, very briefly, to the transfer of share-holdings in our two refinery companies at Kwinwan [a] and Westernport to BP Australia Limited, who will also acquire most of BP's other interests in Australia, and become the main operating company responsible for the supply, shipping, refining and marketing. The Holding Company in Australia, The British Petroleum Company of Australia Limited, will, however, continue to exist.
>
> I am notifying you of this change, which is aimed to be effective from the beginning of 1970, before any public announcements are made because I know the interest the Councillors and yourself have in the activities of BP Westernport.

> You may rest assured that the change which is envisaged will make no difference to our concern with the development of our activities at Westernport, and I hope I may assume that there will be no difficulty over transferring to BP Australia Limited those rights and privileges which by suitable agreements have been vested in BP Refinery (Westernport) Proprietary Limited."

The letter gave notice of the sort of corporate reorganisation to be expected within a complex like BP and which was specifically contemplated by the refinery agreement.

Mr. Ogden's letter of the 15th December 1969 was acknowledged by the Shire Secretary on the 23rd December 1969:

> "I desire to acknowledge receipt of your letter of 15th December, . . . and in reply have to advise that the effect of the transfer of the shareholdings in B.P. Refinery (Westernport) Proprietary Limited to B.P. Australia Limited on the agreement between this Council and your Company will be considered at an early meeting and you will be advised in due course of Council's determination in the matter."

However, the appellant company did not wait. On the 31st December 1969 a resolution was passed for a members' voluntary winding up of the appellant company, a liquidator being appointed. On the 1st January 1970 the appellant company yielded up occupation of the refinery site to BP Australia Limited. Their Lordships assume that this transfer was in accordance with the refinery agreement.

On the 9th February 1970 the Shire Secretary wrote to the General Manager of the appellant company:

> "With further reference to your letter of the 15th December, I have to advise that my Council has now considered the opinion handed down by its Solicitors in relation to the effect of the Company change, on the agreement between BP. Refinery (Westernport) Pty. Ltd., and this Council.
>
> The Solicitors have advised that the agreement will have no effect once the change has taken place, and as a result Council has resolved to allow the agreement to lapse."

On the 26th February 1970 Mr. Ogden, as General Manager, Westernport Refinery, wrote, this time on behalf of BP Australia Ltd.:

> "I note the advice in your letter of 9th February and I would appreciate an opportunity to discuss with you and with your Council a fresh agreement to record the rates levied in respect of the Westernport Refinery site.
>
> These rates will become payable by BP Australia Limited which, as in the case of the refinery company, is a wholly-owned subsidiary of the holding company for our group in Australia, The British Petroleum Company of Australia Limited. As mentioned in my letter of 15th December, the circumstances of our presence and activities at Westernport are in no way affected by the alteration of our corporate structure. Considerable capital works are now in progress at the refinery site and extensions of the refinery plant will be constructed in the near future.
>
> I trust that you can arrange an early opportunity for discussion of these matters."

On the 14th April 1970 the Shire Secretary replied:

> "In reply to your letter of the 26th February, I desire to advise that the matters raised by you were placed before Council at a Meeting on the 17th March, and I have been instructed to advise that Council may give further consideration to your request at a later date.
>
> You will be advised in due course of any further action taken by Council."

However, the next step seems to have been the respondents' levying of a general (not preferential) rate on BP Australia Ltd. From the time of the transfer the appellant company ceased to give to the respondents statements of the capital expenditure on the refinery site pursuant to clause 5 of the rating agreement; nor, so far as the evidence shows, did anyone else do so.

BP Australia Ltd. appealed against the general rate levied on them, contending that they were entitled to the benefit of the rating agreement. But in *BP Australia Ltd. v. Shire of Hastings* [1973] V.R. 194, the Supreme Court dismissed the case of BP Australia, holding that the rating agreement was personal to the appellant company; and that section 390A should be construed as if the middle part of it read:

> ". . . as to the amount of rates payable by him under this Act *under the agreement from time to time* . . ."

(as the decision was summarised by the Full Court in the instant case); and that the last part of the subsection should be "read down" accordingly.

The appellant company did not seek to argue in the instant case that *BP Australia Ltd. v. Shire of Hastings* was wrongly decided. Even on that construction, it was argued, the rating agreement enured to the benefit of the appellant company, which was a party to the agreement and had resumed occupation in circumstances shortly to be described: the rating agreement did fix the statutory rates to be payable *by him from time to time*. Nevertheless the Full Court was bound by that decision, and their reasoning was bound to take account of it. So their Lordships feel entitled to express some misgiving. As Lord Mersey said in *Thompson v. Goold & Co.* [1910] A.C. 409, 420:

> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."

It seems to their Lordships a particularly strong thing to do so when it amounts to modifying, as against the fiscal subject, words which have a plain, natural and ordinary meaning in his favour. And although Acts Nos. 7014 and 7018 are not in the technical sense *in pari materia* they were obviously passed on the same day in pursuance of a self-same policy and the construction put upon section 390A means that an assignee of the appellant company who was expressly contemplated in the refinery agreement (annexed to No. 7018) as having rights under that agreement would be denied the preferential rating under No. 7014. Having invested enormous sums in a refinery sited to the advantage of the respondents and the State BP would either have to accept being (contrary to the intention of the refinery agreement) locked in an outmoded and inconvenient corporate structure or have to forgo the preferential rating which was the incentive held out for the installation and subsequent maintenance and operation of the refinery within the respondents' district. Even though it were reasonable to restrict the operation of section 390A to the period covered by any agreement thereunder, it hardly seems legitimate to go further. The Supreme Court rightly held that a municipality could only enter into rating agreements as authorised by section

390A. But their Lordships can see no ground for holding that the inclusion of a provision for assignment in an agreement purporting to be made and authorised under that section would have been *ultra vires*. It would not be so unless the last part of subsection (1) is "read down" as in *BP Australia Ltd. v. Shire of Hastings*.

It was no doubt in view of the decision in *BP Australia Ltd. v. Shire of Hastings* that the BP organisation now took steps to place the appellant company in re-occupation of the refinery site, in the expectation or hope that it would be able to take advantage of the rating agreement and section 390A. On the 25th September 1973 the Supreme Court made an order that winding up of the appellant company should be perpetually stayed. By a lease in writing dated the 28th September 1973 BP Australia Ltd. as lessor demised the refinery site with its buildings and plant to the appellant company as lessee for a term of three years.

Pursuant to the lease, the appellant company resumed occupation of the refinery site and its installations on the 28th September 1973, notifying the respondents. Before the first Tuesday in December 1973 (and again before the first Tuesday in December 1974) the appellant company gave to the respondents statements under clause 5 of the rating agreement of "the appellants' capital expenditure upon the refinery site including the amount of such expenditure during the twelve months preceding the date to which the accounts of the appellant are made up, namely 31st December" (Case Stated, paragraph 14). The Case Stated does not specify such amounts: but the words their Lordships have quoted suggest that the appellant company had at least *de facto* resumed the obligation under the refinery agreement to continue to develop and/or maintain the refinery site.

By a rating assessment notice dated the 29th January 1974 the respondents assessed the appellant company in respect of the refinery site at a general rate of $154,960 (whereas a preferential rate calculated in accordance with the rating agreement would have been $50,000). The appellant company appealed to the County Court at Melbourne against the assessment, contending that it was entitled to be preferentially rated under the rating agreement. The learned County Court Judge on the 12th September 1975 dismissed the appeal, saying:

> "In the end I have come to the conclusion that not only is this a personal contract, as the Supreme Court has already decided, but that there was a fundamental condition of continuing occupancy by the appellant. A reading of the whole of the agreement leads, in my opinion, to the finding that it contemplates that the appellant will continuously occupy the site and therefore be liable for rates. I am further of the view that the actions of the parties and the correspondence amounted to an agreement that the agreement was at an end or, if it did not, the appellant was in fundamental breach and the respondent rescinded the contract by its letter of the 9th February 1970, inelegantly expressed though it may have been."

The appellant company requested that a Case should be stated for the determination of the Supreme Court. On the 5th May 1976 the Full Court upheld the decision of the learned County Court Judge. They held, first, that it was an implied condition of the rating agreement that it should continue in operation only so long as the appellant company should be the occupier of the refinery site and rateable as such; so that on the appellant company going out of occupation on the 1st January 1970 the rating agreement came to an end. The Full Court held, secondly, that, if the agreement had not come to an end by the operation of such an implied term, the letter from the appellant company of the

15th December 1969 and the letter of the respondents of the 9th February 1970, in their circumstances, amounted to " a mutual acquiescence between the appellant and the Shire that [the rating agreement] was to be treated as discharged." In view of these findings the Full Court held it unnecessary to determine the third—" wider and more difficult "—point argued on behalf of the respondents—namely, that there had been a repudiation or fundamental breach of the rating agreement by the appellant company, the rating agreement having allegedly imposed on the appellant company an obligation to remain in occupation of the site and to maintain, operate and use the refinery for the purpose, *inter alia*, of enabling the rates to be calculated.

On the 17th June 1976 the Full Court gave leave to appeal to Her Majesty in Council.

Their Lordships turn to the first issue—namely, whether there was an implied term in the rating agreement that it should come to an end on the appellant company ceasing to be in occupation of the refinery site. The Full Court adopted the view expressed in *BP Australia Ltd. v. Shire of Hastings* [1973] V.R. 194 at p. 196:

> ". . . the agreement itself from its terms did not contemplate any assignment by the company of any rights and obligations thereunder, or indeed, any change in the company's ownership or occupancy of the rated land . . . ".

The Full Court carefully reviewed some of the authorities on the implication of terms in a contract—namely, *Taylor v. Caldwell* (1863) 3 B. & S. 826, 833, *Turner v. Goldsmith* [1891] 1 Q.B. 544, 550, *Measures Brothers Ltd. v. Measures* [1910] 2 Ch. 248, 258, 259, and *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592, 605. These authorities led the Full Court to hold, in view of *BP Australia Ltd. v. Shire of Hastings*, that it was an implied condition in the rating agreement that it should subsist only so long as the appellant company remained in occupation.

Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that " it goes without saying "; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

Their Lordships venture to cite only three passages—albeit they are familiar to every student of this branch of the law. In *The Moorcock* (1889) 14 P.D. 64, 68, Bowen L.J. said:

> " I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men. . . ."

It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself.

In *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592, 605, Scrutton L.J. said:

> "A term can only be implied if it is necessary in the business sense to give efficiacy to the contract *i.e.*, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

In *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227, MacKinnon L.J. said:

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'"

The main thrust of the argument for the appellant company was that it was not necessary to give business efficacy to the rating agreement to imply a term in it that it should come to an end on the appellant company going out of occupation of the refinery site, notwithstanding re-occupation after however short an interval. Their Lordships feel the force of this contention. But the alleged implied term is, in their Lordships' view, to be rejected on a simpler and clearer ground.

In their Lordships' view the term which the Full Court held should be implied in the rating agreement must be rejected on the ground that, taking into account the matrix of facts in which that agreement was set, to imply such a term would be wholly unreasonable and inequitable. A group of companies such as the BP group may from time to time for good reasons wish to make changes in its corporate structure—particularly when a period of as long as forty years is envisaged. This possibility was, as has been said, recognised in the refinery agreement, and the identity of the member of the BP group occupying the refinery site cannot have been of the least importance to the respondents. If it was the case, as it must have been, that tripartite negotiations took place between the State, the Shire and representatives of the BP group before the refinery agreement was made and that the offer of substantial rating concessions for a period of more than forty years was an inducement to the BP group to enter into the refinery agreement and to incur the massive capital expenditure necessary to establish a refinery at Crib Point—and it may be that in the absence of that inducement the BP representatives would not have wanted and would not have agreed to establish one there—then it was, to say the least, inequitable to imply a term the application of which in the circumstances of this case means that the rating benefits conferred by the rating agreement were only enjoyed for five and a half years from the 7th May 1964 to the 31st December 1969 instead of for more than forty years. When the rating agreement itself contained no provision for its termination before the expiry of forty years from the commissioning date, to imply a term which operated to deprive those who had been induced to establish the refinery of the advantages of those rating concessions on the ground that those advantages were only to enure so long as the appellant company remained in occupation of the premises, cannot, in their Lordships' opinion, be regarded otherwise than as unreasonable and inequitable.

In the light of the provisions of the refinery agreement to which attention has been drawn, it cannot have been the presumed intention of the parties that such a term should be included in the agreement. If an officious bystander had asked the appellant company at the time the rating agreement was negotiated whether that was what was intended, he would have been suppressed—well, " testily " will do—with " Of course not! ". Indeed, their Lordships doubt whether the reaction of the respondents at the time the agreement was being negotiated would have been any different, even though years later they sought to take advantage of the change of occupation of the site.

Whatever else be the outcome of the appeal, their Lordships are satisfied that it would not be legitimate to imply a term in the rating agreement involving that it should come to an end on assignment in accordance with the refinery agreement.

The Full Court, like the Court in *BP Australia Ltd. v. Shire of Hastings*, was naturally impressed by the difficulty of operating clause 5 of the rating agreement on assignment: it was primarily this that caused the Full Court to imply the term they did. But a far more fundamental difficulty about the rating agreement emerged during the course of argument before their Lordships. It affects its very heart and substance—namely, the quantification of rates in clause 2. Capital expenditure by some other company in BP's Australian group would not enure to the respondents' advantage by way of increase of rates over £25,000 (representing, so their Lordships were told, relevant capital investment of £15m, as against the pivotal figure in the formula of £30m). The appellant company might have transferred all its assets to BP Australia Ltd. and taken simultaneously an immediate lease back without ever going out of occupation. The implied term contended for by the respondents and upheld by the Full Court would not in such circumstances avail the respondents. The appellant company would continue to enjoy preferential rating, but without the capital expenditure by BP Australia being taken into account in the quantification of rates. In other words, the term implied by the Full Court not only operates inequitably; it fails to give business efficacy to a defective contract and vindicate the obvious intention of the parties.

Recognising that a term has to be implied into the rating agreement to give it business efficacy and having reached the conclusion that the term the Full Court held should be implied must for the reasons stated be rejected, what term should be implied which satisfies the five conditions stated?

In their Lordships' view in the light of the matrix of facts in which the rating agreement is set, the answer to that question is clear. It is to imply a term which would make the rating agreement accord with and not differ from the refinery agreement—to imply a provision that if the rights of the " company " (the appellant company under the agreement) were assigned or otherwise disposed of to a company in which the BP Company of Australia Ltd. held 30 per cent or more of the issued share capital, " company " should mean that assignee company.

Such a term would be both reasonable and equitable. It is capable of clear expression. It does not contradict any express term of a contract, but adds to it; and it gives business efficacy to the contract. In the light of the provisions in the refinery agreement it was something so obvious that it went without saying, and if an officious bystander had asked whether that was the common intention of the parties the answer would have been " Of course ".

If such a term is implied, the difficulties about the operation of clause 5 as well as of clause 2 of the rating agreement, in the event of such an assignment by the appellant company and the occupation of the refinery by the assignee company, disappear.

Their Lordships now turn to the alternative ground on which the Full Court decided in favour of the respondents, namely, that the exchange of correspondence at the end of 1969 and the beginning of 1970—specifically the appellant company's letter of the 15th December 1969 and the respondents' letter of the 9th February 1970—constituted an agreement to terminate an *ex hypothesi* subsisting contract. Their Lordships venture to put it in this way, because a contract can only be terminated by agreement if there is manifested a bargain between the parties so to terminate it. The appellant company's letter of the 15th December 1969 cannot be read as a contractual offer to rescind; and the respondents' letter of the 9th February 1970 cannot be read as an acceptance of an offer—or even as a counter-offer. It is merely notice of a resolution which the Council has passed. Their Lordships are therefore in no doubt that, unless the rating agreement came to an end by virtue of some such implied term as that proposed by the respondents, it did not terminate by agreement.

With regard to the respondents' third contention on which the Full Court did not find it necessary to pronounce—namely, that the rating agreement was terminated by the repudiation or fundamental breach by the appellant company in going out of occupation—their Lordships are of opinion that the argument is untenable unless a term such as the Full Court held was to be implied is implied. In their view for the reasons stated no such term is to be implied.

The crux of their Lordships' decision only emerged in the course of argument before the Board. While their Lordships naturally regret that the grounds on which they have reached their conclusion were not considered in the County Court or by the Full Court and that they accordingly have not had the advantage of the views of the learned Judges in those Courts thereon, the point having been taken before the Board, they must decide it. As it was not raised in the appellant company's Case their Lordships as at present advised feel that the fair order as to costs would be that the costs orders below should be undisturbed and that before their Lordships each side should bear its own costs. If either party wishes to make any further submissions about costs their Lordships will entertain them. These should be made in writing in the first instance addressed to the Registrar. If they considered it necessary to do so, their Lordships would reconvene to hear oral submissions from Counsel about costs. Parties are requested to notify the Registrar within fourteen days if they will be making any further submissions.

Subject thereto their Lordships would allow the appeal and remit the case to the Melbourne County Court to make the appropriate order. They will humbly advise Her Majesty accordingly.

[*Dissenting Judgment by Lord Wilberforce and Lord Morris of Borth-y-Gest*]

This appeal is concerned with a general rate for the year 1973/74 levied by the Shire of Hastings upon the appellant in respect of an oil refinery site at Westernport, which is within the respondents' municipal district. The Appellant appealed to the County Court under section 304 of the Local Government Act 1958 which dismissed the appeal. On the request of the appellant, the Court then stated a special Case for determination by the Supreme Court of Victoria. On 5 May 1976 the Full Court of the Supreme Court confirmed the County Court's decision.

The dispute arises out of an agreement between the appellant and the respondents dated 7 May 1964, entered into pursuant to section 390A of the Local Government Act 1958. This is a provision inserted in the Act in 1963 with a view to encouraging the decentralisation of industry by rate concessions. It reads as follows:

> " 390A. (1) The Council of any municipality may enter into an agreement with any person liable to be rated in respect of any land within the municipality which is not within a radius of twenty-five miles of the General Post Office at Melbourne and which is used or to be used for industrial purposes as to the amount of rates that will be payable by him under this Act and the amount of rates so agreed to be paid shall notwithstanding anything in this Act be for all purposes the rates that may be made and levied under this Act in respect of that land.
>
> (2) No such agreement shall be made unless the council is of the opinion that the establishment or maintenance of that industry within the municipality makes a substantial contribution towards the industrial development of the municipality and encourages the decentralization of industry in Victoria.
>
> (3) No such agreement shall have any force or effect until it has been approved by Order of the Governor in Council published in the *Government Gazette*.
>
> (4) The amount of rates to be paid under an agreement may be an amount specified in the agreement or may be an amount calculated in accordance with a method specified in the agreement ".

It may be noted that subsection (1) refers to an agreement " with any person " as to the amount of rates " that will be payable by him ".

On 15 May 1963 the appellant, which is a member company of the British Petroleum Group, and was (until 19 December 1969) a wholly owned subsidiary of The British Petroleum Company of Australia Ltd. and thereafter of BP Australia Ltd., entered into an agreement (the " State Agreement ") with the State of Victoria, which agreement was given statutory effect by the Westernport (Oil Refinery) Act 1963 (Act No. 7018). The Company agreed to erect an oil refinery on a specified site within the respondents' municipal district and thereafter to maintain, operate and use the refinery with all additions and alterations thereto. The " Company " was defined to mean the appellant and, if the rights of the Company were assigned pursuant to the Agreement to any company, that assignee company. The Company had power to dispose of its rights under the Agreement or any interest therein to a company in which The British Petroleum Company of Australia Ltd. held at least 30% of the issued capital.

On 7 May 1964 the appellant and the respondents entered into a rating agreement pursuant to Section 390A (*u.s.*). The Agreement was between the Shire of the one part and the appellant " *hereinafter called 'the Company'* " of the other part. This agreement recited that

(i) *the Company* desired to establish an oil refinery at a specified site

(ii) *the Company* had entered into the State Agreement

(iii) *the Company* occupied the refinery site and was liable to be rated in respect thereof

. . . . .

(vii) the Shire and *the Company* had agreed upon the amount of the rates payable by *the Company* on the refinery site.

The Agreement then proceeded to fix the amount of rates payable by *the Company* on a rising scale over a period. These were nominal amounts up to the commissioning date. Thereafter they were to be calculated according to the total amount of the capital expenditure of *the Company* upon the refinery site by reference to the Balance Sheet and Statement of Accounts of *the Company*. There were various periods stated totalling forty years, at the end of which the Agreement was to cease to have effect. Clause 5 of the Agreement was as follows:

> " 5. From and after the said commissioning date *the Company* shall after the preparation of each annual Balance Sheet and Statement of Accounts and on or before the first Tuesday in December in each year give to the Shire a statement certified by the Company's auditors of the amount of *the Company's* capital expenditure upon the refinery site and such details thereof as the Shire may reasonably require the first of such statements to include the amount of such capital expenditure to that date and to specify the amount of such capital expenditure as at the commissioning date and subsequent statements to include the amount of such capital expenditure during the twelve (12) months preceding the date to which the accounts of *the Company* are made up."
>
> The emphasis on " the Company " is supplied.

There was no provision in the rating agreement enabling the Company to assign the benefit of it to any other company, and it is doubtful whether any such provision would have been valid in view of the terms of section 390A.

The effect of the Agreement, if now applicable to the appellant, would be that the rates for 1973/4 would amount to $50,000. Without the benefit of the Agreement, and calculated under the Local Government Act, they would be $154,960. The rating agreement obtained statutory force on approval by the Governor-in-Council on 26 May 1964.

The events leading to the current dispute are as follows. They are as found in the Case Stated, outside which it is impermissible to go. The appellant constructed the refinery on the refinery site, commissioned it, and operated it. On 31 December 1969 the appellant went into a members' voluntary liquidation. On 1 January 1970 it gave up occupation of the refinery site to BP Australia Ltd. On 21 January 1970 the appellant's liquidator, in the course of distributing its assets in specie, transferred the refinery site and the plant to BP Australia Ltd. This transfer may be taken to have also transferred the benefit of the State Agreement. BP Australia Ltd. remained in occupation of the refinery site from 1 January 1970 to 27 September 1973.

There was correspondence between the appellant and the Shire regarding the rating agreement. On 15 December 1969 the appellant notified the Shire of the intended reconstruction and transfer. It asked for an assurance that " there will be no difficulty over transferring to BP Australia Limited those rights and privileges which by suitable agreements have been vested in BP Refinery (Westernport) Proprietary Limited." The Shire replied to this on 9 February 1970. It said that Solicitors had advised " that the agreement will have no effect once the change has taken place, and as a result Council has resolved to allow the agreement to lapse ". To this BP Australia Ltd. (*sic*) replied on 26 February 1970 suggesting a new agreement. The Shire then assessed rates on BP Australia Ltd. on the normal basis—*i.e.* that the rating agreement did not apply. BP Australia Ltd. appealed to the County Court on the basis that they were entitled to the benefit of the rating agreement. The matter came before the Full Court of the Supreme Court of Victoria on

a Case Stated, which decided that the benefit of the rating agreement was personal to the present appellant Company and could not be conferred upon BP Australia Ltd.

> "It seems clear enough" said Adam J. in his Judgment, "and indeed was not disputed before us, that the rating agreement regarded simply as a contract *inter partes* conferred the rating benefits therein referred to on BP Refinery [the present Appellant]—the occupier of the rated property at the time of the agreement—and no other person."

As regards section 390A (*u.s.*) the Court held that this merely gave necessary legal authority to certain rating agreements, which would otherwise be in conflict with the general law of rating, and did not authorise a municipality to enter into agreements as to the rates which might be payable by persons who might subsequently become the ratepayer in respect of the relevant land. ([1973] V.R. 194).

In consequence of this decision, against which there was no appeal, BP Australia Ltd. paid rates on the normal basis. Moreover it did not give to the respondent Shire any statement of capital expenditure on the refinery site as required by clause 5 of the rating agreement. Nor was any such statement given during the relevant period by the appellant: indeed the appellant was in no position to do so.

Consequent on the decision of the Full Court, the Liquidator of the appellant, on 25 September 1973, applied to the Supreme Court of Victoria, under the Companies Act 1961, for an order that the winding up of the appellant be stayed, and an order to that effect was made by Crockett J. On 28 September 1973, BP Australia Ltd., which was, and still is, the owner of the refinery site, entered into a Lease with the appellant by which BP Australia Ltd. demised the refinery site and buildings and, according to the Case Stated, the plant to the appellant for three years, at no rent. The Lessee agreed to carry out refinery processes on the site as directed by the Lessor. It is not stated who was to finance any expenditure.

The appellant resumed occupation of the site under the Lease and claimed the benefit of the rating agreement. As has been stated, the question whether it was so entitled came before the County Court. The Judge rejected the appellant's appeal on the ground (i) that the rating agreement was a personal contract with a fundamental condition of continuing occupancy by the appellant. He further held (ii) that the agreement had been brought to an end by mutual agreement, and (iii) that the appellant had committed a fundamental breach of the agreement and that the respondents had rescinded it.

On further appeal, the Full Court on the first point agreed with the Judge. It held that the parties to the rating agreement intended, and there was an implication to the effect, that the contract was to remain in force only so long as there continued to exist a state of affairs where the refinery site was in the occupation of the appellant, it maintaining the refinery and being in a position to render accounts of its capital expenditure on the site from time to time. That state of affairs ceased on 1 January 1970.

The Court also upheld the second ground—*i.e.* that the agreement was discharged by mutual consent. It did not decide the third ground.

We deal first with the first, and main, ground of appeal. The appellant's argument rests essentially upon the language of section 390A and in particular upon the last phrase in subsection (1):

> " and the amount of rates so agreed to be paid shall notwithstanding anything in this Act be for all purposes the rates that may be made and levied under this Act in respect of that land ".

This, it is said, is general language which has to be applied on each and every occasion on which, during the currency of an agreement, rates have to be levied in respect of the relevant land. Even if the subsection has to be limited to occasions during which the Company—*i.e.* the other party to the agreement—is in occupation (as indeed is indicated by the words " the amount of rates that will be payable *by him* "), the subsection still applies, for the Company was, in the relevant years, the occupier.

The respondents' contention in answer to this is that the subsection must be read down so only to apply so long as the relevant agreement continues in force and must cease to operate when the agreement ceases to operate. Then, when the agreement is looked at, that can only be read as applying to a situation of continuous operation by the Company with which it is made, and not to a case of intermittent occupation.

We find great force in the respondents' argument. The whole tenor of the agreement is that the appellant would establish the refinery and maintain and develop it. Provision is made for the assessment of the rates each year according to action to be taken on the site by the appellant. In each year, the appellant had to provide a statement, certified by its auditors, of expenditure on the site, and this is to be done after the preparation of each annual Balance Sheet. Not only is the implication of continuity—from year to year of operation and from year to year of expenditure and accountancy—extremely clear, but, further, the agreement will not work if continuity is broken. If the refinery is transferred to another company, the necessary certificates according to the terms of clause 5 cannot be given either by the assignee company or by the appellant company.

Nor can clause 5 be operated if and when (as here) the refinery is re-transferred to the appellant. The appellant accepted that, during the period covered by an assignment, clause 5 would not apply, so that full rates would have to be paid, but argued that on a re-transfer, there would be a capital payment by the appellant by way of consideration which could be treated as expenditure for the purpose of clause 5. This argument will not do. In the first place, there might not be any such capital payment—as indeed there was not in the actual events of the present case: and even if there were, there would be no necessary co-incidence between the payment made and any amount spent on the site. Finally, from the point of view of the rating authority, very difficult problems, as regards budgeting and planning, would be created if during a period of forty years, after an assignment had been made and the full rates charged, there were to be the possibility of the agreement reviving and reducing the rates. From their point of view there was every reason to keep the rating agreement as a personal agreement to the Company and on any transfer of the site to renegotiate it.

The legal consequences of these considerations are not difficult to draw. If, in order to make an agreement work, or, conversely, in order to avoid an unworkable situation, it is necessary to imply a term; if moreover implication of that term corresponds with the evident intention of the parties underlying the agreement, the law not only can but must imply the term. The term to be implied is simply that the agreement should continue in operation only so long as the appellant should be the occupier of the refinery site and rateable as such, and should cease to operate as soon as the appellant should give up occupation of the refinery. Implication of such a term, in such circumstances, is amply supported by

authorities—see *Turner v. Goldsmith* [1891] 1 Q.B. 544, 550, *Measures Bros. Ltd. v. Measures* [1910] 2 Ch. 248, 258. Its basis is simply that when the Company ceases to occupy the site, the subject matter of the agreement ceases to exist.

We therefore agree entirely with the Full Court that, on this ground, the appellant can no longer claim the benefit of the agreement. We need not examine the other grounds canvassed in that Court—that the agreement was discharged by mutual consensus, or that the appellant had repudiated the agreement. It is clear in our opinion that the appeal must fail.

We must however deal briefly with a fresh argument which found its way into the appeal: that was, as we understood it (for it has never been formulated in writing and has assumed a protean character) that the words " the Company " in the agreement of 7 May 1964 may be read as including any company in the British Petroleum Group of Companies which happens to occupy the refinery site. This result is sought to be achieved by means of the recital in the rating agreement of the State Agreement, and of the presence in the State Agreement of a definition in the following terms:

> " 'Company' means BP Refinery (Westernport) Pty. Limited and if the rights of the Company are assigned pursuant to this Agreement to any company means that assignee company ".

With this must, it is said, be read clause 6(c)

> " The Company shall have the right to assign or otherwise dispose of this Agreement or any interest therein to a company in which The British Petroleum Company of Australia Ltd. . . . holds thirty per centum or more of the issued share capital ".

Another version of this argument appears in the majority judgment and consists in saying that a term ought to be implied that if the rights of the appellant Company were assigned or otherwise disposed of to a Company in which the British Petroleum Company of Australia held 30% or more of the issued share capital "Company" should mean that assignee company.

Of this argument we would say:

1. It was not put forward in either Court below, nor taken or hinted at in the appellant's printed case.

2. It is inconsistent with the decision of the Full Court in the earlier case concerned with BP Australia Ltd., and involves contending that that unappealed decision was wrong. In our respectful opinion it was right.

3. It is inconsistent with the appellant's own action in December 1969 when it requested that their rights and privileges *vested* in the appellants might be *transferred* to BP Australia Ltd.

4. It introduces a method of interpretation which is novel and unsound. We have referred above to the agreement of 7 May 1964 which contains its own definition of " the Company "—*i.e.* the appellant. Every reference in that agreement to the Company—we have mentioned the main references above—is beyond doubt reference to the appellant Company and to no other entity. To vary an expressed definition agreed between the parties by reference to a recital of another agreement of a different character between different parties involves a process alien to normal methods of construction.

5. The introduction of the new " implied term " cannot be justified under the normal principles. It is not necessary in order to produce business efficacy, is inconsistent with the expressed terms of the rating agreement, and, in our opinion, is not authorised by secton 390A. In effect it would impose upon the Shire a contractual party to which the Shire has not assented.

6. The extended definition does not produce the result aimed at. For one of two things: *either* the extended definition means "any company in the BP Group "—but in that case it departs from the " incorporated " definition; *or*, if the " incorporated definition " is taken, it produces the wrong result, for the assignee company is BP Australia Ltd. to which alone the benefit of the State Agreement has been transferred and which has not re-transferred it to the appellant. It cannot produce the appellant Company which has parted with the State Agreement and now has merely a three year lease of the site.

We would uphold the judgment of the Full Court and dismiss the appeal.

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In the Privy Council

B.P. REFINERY (WESTERNPORT) PROPRIETARY LIMITED

v.

THE PRESIDENT COUNCILLORS AND RATEPAYERS OF THE SHIRE OF HASTINGS

Printed by HER MAJESTY'S STATIONERY OFFICE
1977